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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MONIKA TAYLOR,

Plaintiff and Appellant,

v.

VIRTUAL BANK et al.,

Defendants and Respondents.

D068074

(Super. Ct. No.
37-2013-00032658-CU-OR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Meyer, Judge. Affirmed.

Monika Taylor, in pro. per.; Andrews Law Group and Brian C. Andrews, for Plaintiff and Appellant.

Houser & Allison and Brian Wagner, Gabriel Ozel, for Defendant and Respondent.

Plaintiff and appellant Monika Taylor appeals a summary judgment in favor of defendants and respondents Sabadell United Bank, N.A. (Sabadell) as assignee of the Federal Deposit Insurance Corporation, as Receiver for Lydian Private Bank, Palm

Beach, Florida, pursuant to that Certain Purchase and Assumption Agreement dated as of August 19, 2011, with Lydian Private Bank also being known of record as VirtualBank, a Division of Lydian Private Bank (Virtual Bank); and Bayview Loan Servicing, LLC (Bayview).

Taylor contends: (1) Sabadell and Mortgage Electronic Registration Systems, Inc. (MERS) were not proper real parties in interest; (2) the trustee's sale was wrongful because the foreclosure deed was facially void; (3) as a homeowner, she has standing to claim the nonjudicial foreclosure was wrongful under *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919; (4) the Perata Mortgage Relief Act (Civ. Code,¹ § 2923.5) is binding on this court; (5) she stated a cause of action under section 2923.6, subdivision (f)(3); and (6) respondents violated the Homeowner's Bill of Rights (§ 2924; HBOR). We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 2005, Taylor borrowed \$435,200 from Virtual Bank. The loan was secured by a deed of trust on a single-family residence located in Chula Vista, California. In 2012, MERS assigned the deed of trust to Sabadell.

In 2012, Aztec Foreclosure Corporation (Aztec) recorded a notice of default and election to sell the property indicating Taylor owed \$40,951.54 in past payments. On January 7, 2013, Aztec recorded a notice of trustee's sale indicating the property would be sold at a public auction at month's end.

¹ All statutory references are to the Civil Code unless otherwise stated.

In mid-January 2013, Taylor and Bayview, which was acting as servicing agent on the loan on behalf of Virtual Bank, corresponded regarding Taylor's request for a loan modification. In March 2013, Bayview wrote Taylor a letter denying her request because she had "excessive obligations outside of [her] monthly mortgage commitment."

In April 2013, Taylor appealed Bayview's decision, writing: "Your letter provides for a 30[-]day period in order to appeal this denial. Therefore, this response is submitted to appeal your decision." Taylor claimed her current income of \$2,250 per month sufficed to modify the loan. She also said that starting April 1, 2013, she would rent some space in the house, thus her income would increase by \$1,250 monthly. She added: "Please let me know what documents would need to be provided in order for this income to be considered for my modification. Per our last conversation of April 4, [2013], you indicated that a lease agreement is not a sufficient document."

On April 10, 2013, Bayview replied to Taylor's request, stating that within five business days it would review her documentation and notify her by mail if it needed further information. Bayview also said that within 30 days of receipt of all the documentation required, it would provide Taylor with a written decision regarding her request. Bayview added: "This letter and the loan workout review process shall not waive any of our rights or your obligations under the note or mortgage. In other words, you are responsible to continue making your loan payments (to the extent that you have not been relieved of your obligations under the note if discharged in a Chapter 7 Bankruptcy proceeding.)" The record does not indicate that Bayview sent Taylor another written response before the foreclosure sale.

In July 2013, the house was sold at a foreclosure sale, and Aztec recorded a trustee's deed upon sale. Taylor remained on the property without curing the default. Sabadell brought an action against Taylor for unlawful detainer.

In January 2013, Taylor sued respondents and MERS, alleging causes of action for declaratory relief, fraudulent transfer, and violation of the HBOR. She also sought an injunction.

In February 2013, Taylor obtained a temporary restraining order to enjoin respondents from proceeding with a foreclosure sale of her residence during the pendency of this action, subject to Taylor paying Sabadell \$2,194.00 monthly. Taylor also sought an order to show cause regarding a preliminary injunction. The court eventually denied the order to show cause regarding the preliminary injunction.

The court sustained respondents' demurrer with leave to amend only the HBOR cause of action. Accordingly, Taylor filed a first amended complaint alleging that single cause of action. Respondents and MERS demurred to the first amended complaint, and the court sustained it without leave to amend as to MERS, but overruled it in all other respects. It thereafter entered judgment dismissing MERS from the action.

In February 2014, the court issued a preliminary injunction preventing respondents from evicting Taylor from the property. Taylor was required to pay the bank \$3,000 monthly. The court subsequently dissolved the preliminary injunction.

Sabadell and Bayview moved for summary judgment or, in the alternative, summary adjudication, arguing that no triable issue of fact existed as to whether they violated the HBOR because (1) Taylor had not submitted a loan modification application

before the notice of sale was recorded; (2) the trustee's sale occurred after Taylor's loan modification application was denied; (3) section 2923.6, subdivision (f)(3)² was inapplicable because Taylor's loan modification application was denied based on her excessive financial obligations, not on a net present value calculation; (4) Taylor was not legally entitled to multiple loan modification reviews; (5) prior to the foreclosure sale, Taylor did not provide documentation evidencing her changed financial circumstances; (6) Taylor's loan modification was properly denied and she failed to appeal that decision; (7) Bayview took into account Taylor's changed financial circumstances as stated in her second loan modification application, which it denied because she had insufficient income; and (8) Taylor offered no evidence she had suffered any actual economic damages. Respondents attached to their motion declarations by Douglas Jennings, Sabadell's senior asset manager, and Gabriel Ozel, Sabadell's attorney, and accompanying exhibits.

In opposing summary judgment, Taylor did not file a separate statement. She argued in her memorandum of points and authorities that (1) respondents foreclosed on her home while her loan modification application was pending, thus violating section

² Section 2923.6, subdivision (f)(3) provides that following a mortgage servicer's denial of a first lien loan modification application, it shall send a written notice to the borrower identifying the reasons for the denial, including "[i]f the denial is the result of a net present value calculation, the monthly gross income and property value used to calculate the net present value and a statement that the borrower may obtain all of the inputs used in the net present value calculation upon written request to the mortgage servicer."

2923.6, subdivision (c);³ (2) respondents violated section 2923.6, subdivision (f)(3) by denying her application without providing the figures used to calculate the net present value; (3) she properly appealed the denial of her application; and (4) the assignments of the deed of trust were invalid as fraudulent conveyances and respondents were not entitled to sell the property; further, MERS did not own the promissory note, therefore MERS was a mortgagee in name only and had no beneficial interest in the mortgage instrument. Taylor did not address the issue of damages in any way.

At the summary judgment hearing, the court asked Taylor to specify her economic damages. She denied she had lived in the house rent free for two years, claiming—without supporting evidence—that she had paid almost \$30,000, not including a \$5,000 bond. She added, "Yeah, I do experience serious health problems, and my son, my special needs son that I'm raising in this house for the last 10 years, also experiencing special—also experience [*sic*] serious medical problems, and we had to rely on the house." The court clarified, "So your family experienced health problems? That's—

³ Section 2923.6, subdivision (c) provides that "[i]f a borrower submits a complete application for a first lien loan modification offered by, or through, the borrower's mortgage servicer, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending." Under this statute, a notice of default or notice of sale may not be recorded until any of the following occurs: "(1) the mortgage servicer makes a written determination that the borrower is not eligible for a first lien loan modification, and any appeal period . . . has expired; [¶] (2) the borrower does not accept an offered first lien loan modification within 14 days of the offer; and [¶] (3) the borrower accepts a written first lien loan modification, but defaults on, or otherwise breaches the borrower's obligations under, the first loan modification."

those are your damages?" Taylor replied, "Yes." We note that Taylor was not sworn as a witness.

In granting the motion, the Court preliminarily pointed out: "[Taylor] has failed to submit a separate statement of undisputed/disputed facts or any opposing evidence." (Some capitalization omitted.) It cited Code of Civil Procedure section 437c, subdivision (b)(3), to the effect that: The opposition papers must include a separate statement responding to each of the material facts the moving party contends to be undisputed, and identifying any other material facts the opposing party contends are disputed. Each material fact must be followed by a reference to supporting evidence.

The court's ruling states: "Based upon the evidence submitted, there appears to be a triable issue of material fact as to whether defendants violated [section 2923.6, subdivision (g)]."⁴ The court nonetheless concluded, "Regardless of a possible violation, there is no evidence to support the element of damages." Specifically, the court stated, "There is no evidence suggesting a violation that was intentional or reckless, or the result of willful misconduct. [¶] There is no evidence that [Taylor] sustained actual economic damages as a result of the purported violation. At the time Bayview sent the April 10,

⁴ Section 2923.6, subdivision (g) states: "In order to minimize the risk of borrowers submitting multiple applications for first lien loan modifications for the purpose of delay, the mortgage servicer shall not be obligated to evaluate applications from borrowers who have already been evaluated or afforded a fair opportunity to be evaluated for a first lien loan modification prior to January 1, 2013, or who have been evaluated or afforded a fair opportunity to be evaluated consistent with the requirements of this section, unless there has been a material change in the borrower's financial circumstances since the date of the borrower's previous application and that change is documented by the borrower and submitted to the mortgage servicer."

2013 letter, a TRO was in place. [Taylor] had the opportunity to obtain a preliminary injunction but failed to present sufficient evidence demonstrating a likelihood that she would prevail. . . . [¶] Despite no injunctive order in place, [Taylor] continued to live on the property and to collect rent from her tenant. When defendants began eviction proceedings, the Court granted a TRO on October 31, 2013, conditioned upon posting a bond, pending hearing on a preliminary injunction. The bond was posted. A hearing for another preliminary injunction was set on February 14, 2014. The preliminary injunction was granted conditioned upon [Taylor] making monthly payments in the amount of \$3,000 commencing March 1, 2014. [Taylor] failed to make the payments. The preliminary injunction was dissolved in September 2014. [¶] [Taylor] has lived on the property and collected rent from a tenant for two years without paying [mortgage payments]."

DISCUSSION

I. *Standard of Review*

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A moving defendant meets the burden of showing that a cause of action has no merit by establishing that one or more elements of a cause of action cannot be established or that there is a complete defense. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849-850; *Lackner v. North* (2006) 135 Cal.App.4th 1188, 1196.)

On appeal, we independently review an order granting summary judgment, viewing the evidence in the light most favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; *Lackner v. North*, *supra*, 135 Cal.App.4th at p. 1196.) In this review, "we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue." (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.)

II. *Taylor's HBOR Contention Fails*

The trial court stated in its ruling, "there appears to be a triable issue of material fact as to whether defendants violated [section 2923.6, subdivision (g)]." However, Taylor's operative first amended complaint and, in turn, her opposition to summary judgment, raised no claims under section 2923.6, subdivision (g). Instead, she alleged violations of section 2923.6, subdivisions (c) and (f)(3). The court failed to address the claimed violations of these subdivision.

In arriving at its conclusion that there was a possible triable issue of fact under section 2923.6, subdivision (g), the court apparently treated Taylor's appeal as a second request for a loan modification. We need not address this irregularity because we agree with the court's ultimate conclusion that there was no triable issue of fact as to damages. Summary judgment will be affirmed if legally correct, without regard for the trial court's

reasoning. (*California State Electronics Assn. v. Zeos Internat. Ltd.* (1996) 41 Cal.App.4th 1270, 1275.)

On appeal Taylor has forfeited any argument that respondents failed to meet their initial burden of production with respect to damages by failing to so argue in her opening brief (or below). (See *Fidelity National Title Ins. Co. v. Schroeder* (2009) 179 Cal.App.4th 834, 847 fn. 11; *Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 864, fn. 12.)

Respondents met their summary judgment burden by showing that Taylor could not meet the damages element of her HBOR claim. Specifically, they addressed the issue of economic damages in their separate statement of undisputed material facts: "No triable issue of fact exists as to [Taylor's] first cause of action for violation of [HBOR] because [she] offers no evidence that she suffered any economic damages." (Some capitalization omitted.) Respondents provided evidentiary support for their separate statements that Taylor continued to reside in the property without making her monthly mortgage payments, and while she was collecting rental income from the property.

By failing to respond to respondents' separate statement of undisputed facts and supporting evidence, Taylor did not raise a triable issue of material fact as to whether respondents violated section 2923.6, subdivisions (c) and (f)(3); therefore, her claims fail. "Without a separate statement of undisputed facts with references to supporting evidence in the form of affidavits or declarations, it is impossible for the plaintiff to demonstrate the existence of disputed facts." (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116.) Under Court of Civil Procedure section 437c, subdivision (b)(3), when a

moving party makes the required prima facie showing, failure to comply with this requirement may, in the court's discretion, constitute a sufficient ground for granting the motion. (*Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co.* (2009) 170 Cal.app.4th 554, 568.) "Section 437c is a complicated statute. There is little flexibility in the procedural imperatives of the section, and the issues raised by a motion for summary judgment (or summary adjudication) are pure questions of law. As a result, section 437c is unforgiving; a failure to comply with any one of its myriad requirements is likely to be fatal to the offending party." (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1607.)

At oral argument before us, counsel argued that Taylor had spent over \$80,000 adapting her house for her special needs son, who would be traumatized by being forced to move out of the house. He also argued Taylor was entitled to the greater of treble actual damages or statutory damages of \$50,000 dollars allowable under section 2924.12, subdivision (b). "Argument of counsel of course is not evidence." (*El Dorado Irrigation District v. Superior Court of Sacramento County* (1979) 98 Cal.App.3d 57, 62.) Taylor's unsworn comments at the hearing on the motion, in the absence of a separate statement, did not constitute evidence. Further, it remains undisputed, as respondents argued in their motion, that Taylor lived in the property two years and collected monthly rent, but she did not pay her mortgage. In response to a motion for summary judgment, the plaintiff must present concrete evidence of damages. (*Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 14.) The opposing party cannot controvert the moving party's declarations by evidence "based on speculation, imagination, guesswork, or mere possibilities." (*Doe v. Salesian Society* (2008) 159 Cal.App.4th 474, 481.)

Taylor's counsel overlooks that under section 2924.12, subdivision (b), the statutory damages may be awarded only if respondents engaged in intentional, reckless or willful misconduct so as to warrant an award of the greater of treble actual damages or statutory damages of \$50,000 dollars. In light of the evidence presented, including the notice of sale, Taylor's January 2013 loan modification request, and Bayview's March 2013 denial of it, the trial court concluded respondents had not violated section 2924.12, subdivision (b) by engaging in intentional, reckless or willful misconduct. Taylor failed to meet her summary judgment burden of disputing respondents' evidence and raising a triable issue of material fact when she did not submit a separate statement and supporting evidence for her contrary claim; therefore, the trial court did not err by concluding she had failed to make out her claim of damages.

III. Taylor's Other Contentions Fail

Turning to Taylor's other contentions, we conclude they also fail. She contends the "[t]ransfer of an interest in the deed of trust alone is void. MERS acted only as a 'nominee' for Virtual Bank under the deed of trust. Since no evidence has been offered that the promissory note has been transferred, MERS could only transfer whatever interest it had in the deed of trust. However, the promissory note and the deed of trust are inseparable." (Some capitalization omitted.) She argues, "MERS was acting 'only as a nominee,' under the deed of trust and that there was no evidence of the note being transferred." Taylor also contends that any assignment by MERS of the deed of trust, or the note, to a third party for purposes of foreclosure is void. She asserts: "Virtual Bank was liquidated on August 19, 2011[,] by the Office of the Comptroller of the Currency,

which appointed the FDIC as receiver. The FDIC and Defendant Sabadell, entered into a loss-share transaction on [907.1 million dollars] of Defendant's Virtual Bank assets. At that time, [Taylor] would not know about it looking at the Defendant's Virtual Bank homepage because nothing has changed about it and no information was provided that Defendant Virtual Bank was acquired by Defendant Sabadell." Taylor also contends the trustee's sale held on July 17, 2013, was "wrongful as [the] foreclosure deed was facially void." (Some capitalization omitted.) Citing to the original complaint, Taylor claims "defendants did not own or were not entitled to enforce the power of sale clause in the purported deed of trust." (Some Capitalization omitted.) She also claims she has standing to bring a wrongful foreclosure claim under *Yvanova v. New Century Mortgage Corp.*, *supra*, 62 Cal.4th 919. We reject these claims because, as noted, the pleadings frame the motion for summary judgment. Here, the original complaint was superseded by the operative first amended complaint, which alleged no wrongful foreclosure cause of action, only one for violation of the HBOR.

Taylor asserts that "the Perata Mortgage Relief Act is binding on this court." This assertion is not further explained, and we see no relevance to Taylor's claim for an HBOR violation. No such cause of action was pleaded under that statute in the first amended complaint; therefore, this claim was not subject to summary adjudication or judgment. It follows that it is not cognizable on appeal.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

O'ROURKE, J.

WE CONCUR:

HALLER, Acting P. J.

AARON, J.